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OCTOBER TERM, 1997

ALTA BATES CORPORATION,
ALTA BATES MEDICAL CENTER, and
PATHOLOGY INSTITUTE, INC.,
Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

and

OFFICE AND PROFESSIONAL EMPLOYEES
INTERNATIONAL UNION, LOCAL 29, AFL-CIO
Intervenor.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF *AMICUS CURIAE* OF EMPLOYERS GROUP IN SUPPORT OF PETITIONERS

LEE T. PATERSON
Counsel of Record

SONNENSCHEIN NATH & ROSENTHAL

601 South Figueroa Street, Suite 1500
Los Angeles, California 90017
(213) 623-9300

Attorneys for *Amicus Curiae*

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Attorneys for *Amicus Curiae*

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BRIEF OF *AMICUS CURIAE* OF EMPLOYERS GROUP IN SUPPORT OF PETITIONERS

I.

INTRODUCTION

This brief is submitted, with the consent of all parties, by Employers Group to request that the Court accept for Certiorari the case of *Alta Bates Corp. v. NLRB*, 116 F.3d 482 (9th Cir. 1997).[1]

II.

INTEREST OF *AMICUS CURIAE*

Employers Group is one of the nation's largest human resources management associations, representing nearly 5,000 companies of all sizes in every industry, which collectively employ approximately 2.5 million employees. The Employers Group, formerly known as Merchants & Manufacturers Association and the Federated Employers, is integrally involved in important employment related issues. In that role, it frequently

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[1] This brief was authored solely by Lee T. Paterson, Esq. and Sonnenschein Nath & Rosenthal, counsel for *amicus curiae*, Employers Group. Employers Group is affiliated with only one wholly-owned subsidiary, Employers Group Service Corp. No person or entity other than the *amicus curiae*, its members or its counsel has made any monetary contribution to the preparation or submission of this brief.

participates as *Amicus* in many significant labor and employment cases.

III.

SUMMARY OF ARGUMENT

Employers Group urges the Court to accept the case of *Alta Bates Corp. v. NLRB, supra*, 116 F.3d 482 for certiorari to resolve the conflict between this case and prior cases in this Court and the First, Third, Fifth, Sixth, Eighth and the District of Columbia Circuit Courts of Appeals. Employers and unions have relied for thirty years on the rule that affiliated employers who did not exercise actual control over the labor relations of another company could not be joined as a single employer in bargaining units, unfair labor practices or economic action such as picketing, boycotts, and strikes. *Radio & Television Broadcast Technicians Local Union 1264 v. Broadcast Services*, 380 U.S. 255, 256, 85 S.Ct. 876, 877 (1965). The *Alta Bates* decision overturns thirty years of precedent. Parent companies, subsidiary companies, partners and joint venturers, who are not involved in the labor relations of another company are subject to being dragged into labor relations conflicts which were not of their making and over which they exercised no control. The effect of this decision is to destabilize employer-employee relations throughout the United States.

IV.

ARGUMENT

A. Employers and Unions Have Relied for Thirty Years on the Decisions of the Circuit Courts of Appeals and the National Labor Relations Board Holding That an Entity was Not Part of a Single Employer Unless it Exercised Actual Control Over the Labor Relations of a Related Company.

In *Radio & Television Broadcast Technicians Local Union 1264 v. Broadcast Services*, 380 U.S. 255, 85 S.Ct. 876 (1965) ("*Radio Union*"), this Court approved the "integrated enterprise" test to determine employer status. The most important but not controlling prong of that test is "centralized control of labor relations." Since the decision is *Radio Union*, until this case, the NLRB and the First, Third, Fifth Sixth, Eighth, Ninth and the District of Columbia Circuit Courts of Appeals have required that an entity must exert actual control rather than potential control to meet the test.

In 1966 the NLRB followed this Court's decision in *Radio Union, supra*, and held in *Drivers, Chauffeurs and Helpers Local No. 639 (Poole's Warehousing)*, 158 N.L.R.B. 1281, 1286 (1966) that actual rather than mere potential control of labor relations was necessary to establish single-employer status. Since that time until this case, every decision of the NLRB which discusses the issue of actual versus potential control has held that actual control of labor relations is necessary for single employer status. *See, e.g., Leisure World Sales Corp.*

Inc., 163 N.L.R.B. 668 (1967), *Fedco Freight Lines, Inc.*, 273 N.L.R.B. 399 (1984), *Emsing's Supermarket, Inc.*, 284 N.L.R.B. 302 (1987).

The Circuit Courts of Appeals for the First, Third, Fifth Eighth, and the District of Columbia Circuits have uniformly held that actual rather than potential control of labor relations is required for single-employer status. In *J.G. Roy & Sons Company v. NLRB*, 251 F.2d 771 (1st Cir. 1958) the Court held that a strike against a neutral employer was unlawful secondary activity. The Court stated, ". . . while common ownership was admitted, it was specifically found that there was no actual common control over labor policies . . . ." 251 F.2d at 773. In *Limbach v. Sheet Metal Workers International Assn.*, 949 F.2d 1241, 1258 (3rd Cir. 1991) the court sustained a jury instruction which required actual control of labor relations. The court stated "[s]ince potential control would always rest with the parent in such a situation, what is required is actual control." *Id.* at 1260. The Fifth Circuit held in *Sheet Metal Workers International Assn. v. Atlas Sheet Metal Company*, 384 F.2d 101 (5th Cir. 1967), the Sixth Circuit held in *Boich Mining Company v. NLRB*, 955 F.2d 431 (6th Cir. 1992) and the Eight Circuit held in *Bachman Machinery Co. v. NLRB*, 266 F.2d 599 (8th Cir. 1959) that there must be actual control of labor relations to determine that an employer is a primary employer for purposes of a secondary boycott. In *Retail Store Employees Union, Local 1001 v. NLRB*, 627 F.2d 1133 (D.C. Cir. 1979), *rev'd on other grounds*, 447 U.S. 607, 100 S.Ct. 2372 (1980) the court held that land title companies with common directors were not single employers. The court stated ". . . mere unity of interests is not enough, nor even is some unity of ownership; there 'must be in addition such actual or active common control, as distinguished from merely a

potential, as to denote an appreciable integration of operations and management policies.' " 627 F.2d at 1138.

Even the Ninth Circuit, in prior cases, has required actual versus potential control to determine single-employer status. In *NLRB v. Transcontinental Theaters, Inc.*, 568 F.2d 125, 131 (9th Cir. 1977) the Ninth Circuit refused to enforce an NLRB order holding that a lessor and his lessee were a single employer. The Board had determined that the lessor exercised actual control over the lessee's labor relations by placing contractual caps on operating costs in the lease. The Ninth Circuit held that the NLRB was required to demonstrate that the lessor exercised actual control rather than potential control over the lessee's labor relations. After reviewing the record, the Court found that contractual caps on operating costs were too tenuous to create actual control of labor relations, "particularly in view of the lack of evidence that respondent ever made an attempt to control . . . labor relations or policies, through its authority to determine operating costs or otherwise."

Employers and unions throughout the United States have relied on these NLRB and court decisions. This reliance has encouraged labor stability and discouraged employers and unions from engaging in unlawful activity.

B. This Decision Destabilizes Labor Relations in Bargaining Unit Determination, Unfair Practice Liability and Economic Action Such as Picketing, Boycotts and Strikes.

Due to the extensive precedent on this issue, employers and unions have known for thirty years who the responsible employer is for purposes of bargaining, unfair labor practice liability and economic action. The large number of cases which have ruled on this test is indicative of the seriousness of this issue.

Employers and Unions need to know where to draw the line. Until this decision, the line was drawn at actual behavior: an entity who chooses to take the benefit of control has to also take the burden of economic action, union recognition and liability. The NLRB and the Ninth Circuit decision, in this case, now purport to draw the line at potential control. However, in a economic society of conglomerates, joint ventures and partnerships, there is no clear line where potential control ends. Every parent company is now exposed to the labor relations problems of its subsidiaries, since, as the court stated in *Limbach, supra*, ". . . potential control would always rest with the parent . . . ." 949 F.2d at 1260. Every subsidiary is now exposed to the liabilities of its sister subsidiaries. Every joint venturer is liable for the labor misdeeds of its co-venturer. Even lessors face liability for the labor relations of their lessees. *Cf. NLRB v. Transcontinental Theaters, Inc., supra*, 568 F.2d 125.

C. This Decision Impacts Other Employment Laws Which Rely Upon the Same Test.

Courts have applied the *Radio Union* "integrated enterprise" test to claims under a number of different laws including Title VII of the Civil Rights Act, the Americans with Disabilities Act, the Pregnancy Discrimination Act, the Ku Klux Klan Act of 1871 (29 U.S.C. § 1983), 29 U.S.C. § 1981 and 29 U.S.C. § 1982. In each of those cases, the courts have relied upon precedent requiring actual rather than potential control of labor relations.

In *Fike v. Gold Kist, Inc.*, 514 F. Supp. 722 (1981 N.D. Ala.) the Plaintiff alleged violations of Title VII of the Civil Rights Act, and the Ku Klux Klan Act for pregnancy discrimination. The court dismissed the alleged employer stating, "[i]t is well settled that the 'control' required to meet the test of centralized control of labor relations is not potential control, but rather actual control of day to day labor practices." *Id.* at 727.

In *Webb v. American Red Cross*, 652 F. Supp. 917 (D.C. Neb. 1986) the Plaintiff alleged violations of Title VII of the Civil Rights Act and constitutional guarantees of equal protection and due process. The court had to determine whether it had subject matter jurisdiction over the American Red Cross for the alleged discriminatory actions of its local chapter. The court applied the four prong test used by this Court in *Radio Union, supra*, and stated, "[t]he requisite control is not potential control, but rather actual and active control of the day to day labor relations." The court dismissed the American Red Cross from the suit.

In *Jackson v. NFL*, 1994 U.S. Dist. Lexis 8303; 65 Fair Empl. Prac. Cas. 358 (S.D.N.Y. 1994) the Court applied the integrated enterprise test to a claim of violation of 42 U.S.C. § 1981 and Title VII of the Civil Rights Act. The plaintiff argued that potential control was sufficient to meet the centralized control test. The court held that in determining employer status that it is actual rather than potential control which is determinative.

In *Tatum v. Everhart*, 954 F. Supp. 225 (D.C. Kan. 1997) in determining employer status under Title VII of the Civil Rights Act and the Age Discrimination in Employment Act, the court applied the four prong test used in *Radio Union, supra.* The court stated, "[t]o establish centralized control, the parent corporation's control of the day to day employment decisions of the subsidiary must be shown. Day to day control must actually be exercised; potential control is not sufficient." *Id.* at 228.

The decision in this case, impacts the determination of single-employer status under employment discrimination laws as well as the National Labor Relations Act. This case muddies the waters where clarity is needed. Employers and employees in employment discrimination cases, need to know where liability begins.

V.

CONCLUSION

The National Labor Relations Act was enacted to promote labor peace and to prescribe the lawful rights of employers and employees. 29 U.S.C. § 141. This decision promotes confusion, litigation and economic warfare. The Court needs to draw the line between actual and potential control so that employers and unions know the point where unlawful activity begins.

DATED: October 16, 1997.

Respectfully submitted,

SONNENSCHEIN NATH
& ROSENTHAL

LEE T. PATERSON
Counsel of Record

Attorneys for *Amicus Curiae*
Employers Group